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86-579

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

IN THE MATTER OF:

LINDA FEUERER,

Petitioner

vs.

ADAMAR OF NEW JERSEY, INC.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ROBERT A. DAVITCH,
On the Petition

QUESTIONS PRESENTED

1. Did the Third Circuit err and disregard the Supreme Court's, its own and other Circuits' standards for review by affirming, in a judgment order, the District Court's ruling that an admittedly erroneous charge given to a jury on a substantial and contested issue, constituted harmless and not reversible error?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Linda Feuerer, respectfully prays that a writ of certiorari issue to review the judgment order of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 11, 1986, and the order of the Third Circuit entered on July 9, 1986, denying her petition for a panel rehearing.

OPINIONS BELOW

Petitioner requests review of the judgment of the United States Court of Appeals for the Third Circuit, reproduced in the appendix at 8a-10a, affirming a final order entered by the United States District Court for the Eastern District of Pennsylvania. The memorandum decision of the United States District Court for the Eastern District of Pennsylvania (McGlynn, D.J.), has not been reported. It is reprinted in the appendix at 1a-7a, infra.

On June 25, 1986, petitioner filed a petition for a panel rehearing with the Third Circuit pursuant to Fed.R.App.P. 40(a). On July 9, 1986, the Third Circuit entered an order denying that petition. A copy of that order is reproduced in the appendix at 11a, infra.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. Section 1332, the petitioner

brought this action in the Eastern District of Pennsylvania. On September 19, 1985, the District Court entered a memorandum and final order denying petitioner's motion for a new trial pursuant to Fed.R.Civ.Pro. 59.

On petitioner's appeal, the Third Circuit on June 11, 1986, entered a judgment order affirming the District Court's final order. On June 25, 1986, petitioner filed a petition for a panel rehearing which the Third Circuit denied in an order entered on July 9, 1986.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

28 U.S.C. Section 1291. Final decisions of district courts

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final

> decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1291(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

Petitioner, Linda Feuerer (known herein as "Feuerer"), commenced this action in the Eastern District of Pennsylvania, to recover damages for personal injuries she suffered on December 9, 1981, when she slipped and fell in a public restroom in the Tropicana Hotel and Casino in Atlantic City, New Jersey. She sued respondent, Adamar of New Jersey, Inc. (known herein as "Adamar"), a corporation which owned and operated the Tropicana. In her complaint, Feuerer alleged that Adamar was negligent; that Adamar's negligence was the proximate

cause of her accident; and that Adamar's negligence was also a proximate cause of her injuries.

Feuerer's case against Adamar proceeded to trial before a jury on November 7, 1984. New Jersey law was applied to the case.

At the trial, Feuerer, who was born in 1953, presented evidence that Adamar was negligent in maintaining the restroom, and that its negligence was the cause of her fall. Evidence was also presented that, as a result of her fall, Feuerer severely injured both of her knees, and that her knee injuries were progressive and permanent. The evidence showed that by the time of trial, Feuerer had already incurred in excess of $35,000.00 in medical expenses in connection with the treatment of her knee injuries; that she had already undergone three major knee operations; and that one of the surgeries

had left her with a large, disfiguring scar on her right leg. The evidence showed further that Feuerer had suffered chronic, progressive knee pain since the time of the fall; that she will probably incur more than $100,000.00 in future medical costs relative to the treatment of her knee injuries; that she will probably suffer chronic knee pain for the rest of her life; that she had been disabled by her knee injuries since the accident and will probably be disabled for the rest of her life; and that she will probably never again be able to walk normally, or without the aid of a supportive device such as a cane or a walker.

The evidence presented at the trial showed also that two physicians had treated Feuerer for the knee injuries she had suffered in her fall. They were Dr. Maria A. Limberakis, who had treated Feuerer regularly since the day after the

accident, and Dr. Ronald B. Greene, who had treated Feuerer since September of 1983, and had operated on Feuerer's knees three times since then. Both of these doctors testified on behalf of Feuerer at the trial.

There was not a shred of competent evidence presented at trial by either party that either of Feuerer's treating doctors, or both of them, were negligent or were guilty of malpractice in treating Feuerer for the knee injuries she had suffered in her fall. The case was not tried as a medical malpractice case by either party. No expert was called by Adamar to testify that either of the two doctors, or both of them, had deviated from the applicable standard of care in treating Feuerer. Indeed, no expert even testified as to what that standard is.

Nevertheless, on November 16, 1984, after the close of all the evidence, and

upon the request for counsel for Adamar, the District Judge charged the jury that,

> You can consider whether or not the treatment by [Feuerer's] doctors caused or exacerbated the condition which she now suffers...If there is intervening negligence of the doctor or somebody who treats her, which exacerbates the condition, then, the Tropicana would not be responsible for that.

Counsel for Feuerer objected, timely and promptly, to this portion of the charge, but his objection was overruled.

On November 16, 1984, the jury returned a verdict in favor of Feuerer and against Adamar, in the amount of $50,000.00. In answering special Interrogatories, the jury found that Adamar was negligent and that its negligence was the proximate cause of Feuerer's fall, as well as a proximate cause of Feuerer's knee injuries. The jury also found that Feuerer was comparatively negligent. In apportioning blame for the accident, the jury found

that Adamar was 75% responsible, and that Feuerer was 25% responsible. Accordingly, the District Judge molded the verdict, and entered a judgment in favor of Feuerer and against Adamar, in the amount of $37,500.00.

On November 30, 1984, Feuerer filed a motion for a new trial with the District Judge, pursuant to Fed.R.Civ.Pro. 59. In that motion, Feuerer argued, inter alia, that the District Judge had committed reversible error in instructing the jury that if it found that Feuerer's doctors, or either of them, were negligent in treating Feuerer, and if their negligence had caused an aggravation of Feuerer's knee injuries, Adamar would not be responsible to Feuerer to the extent that the doctors had caused her injuries to be exacerbated. In her motion for a new trial and supporting briefs, Feuerer argued that the District Judge's charge

was clearly and fundamentally erroneous, and might have resulted in the low verdict. Specifically, Feuerer argued that,

(1) Under New Jersey law, Adamar, which was found to be negligent, was automatically responsible, as a matter of law, for the negligence of any physician who treated Feuerer for the injuries she suffered due to Adamar's negligence, and for the consequences of the physician's negligence. The highest appellate courts of New Jersey had repeatedly so ruled. See, e.g., Knutsen v. Brown, et al., 96 N.J. Super. 229, 235 (App.Div.1967); Ciluffo v. Middlesex General Hospital, 146 N.J. Super. 476, 482 (App.Div.1977); Knutsen v. Brown, et al., 93 N.J. Super. 522, 542 (Law Div. 1966);

(2) There was no evidence offered by either party that either or both of Feuerer's treating doctors were

negligent or guilty of malpractice in treating Feuerer. It is reversible error for a trial judge to charge a jury on a matter or an issue on which no competent evidence is presented. The Third Circuit itself had so ruled. See, e.g., Paluch v. Erie Lackawanna Railroad Company, 387 F.2d 996, 999, 1000 (3d Cir. 1968); and

(3) The District Judge, by his erroneous charge, gave the jury the right to find that one or both of Feuerer's doctors were negligent in treating her, and to limit Feuerer's damages accordingly, even though: (a) no evidence of malpractice was presented; (b) no charge on what specific conduct would constitute malpractice was given; and (c) the charge completely misstated the law, which holds Adamar automatically responsible for the negligence of Feuerer's treating doctors, and therefore,

it should not have been given even if there was evidence of malpractice. 1

On September 19, 1985, the District Judge entered a memorandum and order denying Feuerer's motion for a new trial. See, Appendix A at 1a-7a. In rejecting Feuerer's contention that he had committed reversible error in charging the jury, the District Judge acknowledged that he may have erred, but ruled,

> Finally, Plaintiff argues that the court's instruction to the jury that the defendant would not be responsible for the intervening negligence of the treating physician was in error....

---

1 As Feuerer argued in her post-trial motion and supporting briefs, although no competent evidence of malpractice was presented, based on the District Judge's erroneous charge, the jury could have relied on certain remarks made by counsel for Adamar in his closing argument, as a basis for reducing the damages award to $50,000.00. For example, counsel for Adamar argued that Feuerer "is no better off today that before Dr. Greene took the knife to her", and that Dr. Limberakis had acted improperly in injecting Feuerer's knees with Novocaine to temporarily relieve her chronic pain.

> [A]s demonstrated by the jury's note to the court, they were not concerned with events after December 1982 - at least nine months before the [first] operation. Thus, even assuming it was error to charge on intervening negligence, said error was harmless.

The District Judge's reference to the "jury's note" in his memorandum opinion was to a written note submitted to the Court by the jury shortly before the verdict was returned. In the note, the jury stated that it had decided to award Feuerer damages to redress Adamar's negligence from the time of the fall until December 24, 1982, which was about one year after the fall. The District Judge correctly noted that Dr. Greene did not operate on Feuerer's knee until September of 1983, approximately nine months after the last date on which the jury decided Feuerer was entitled to recover damages from Adamar.

On September 30, 1985, Feuerer appealed to the Third Circuit from the

District Judge's memorandum and order denying her motion for a new trial. In her brief filed with the Third Circuit on December 11, 1985, Feuerer argued, inter alia, that the District Court had committed reversible error in instructing the jury that Adamar was not responsible for any aggravation of her injuries that were initially caused by the negligence of Adamar, which aggravation may have resulted from the negligence of one or both of her treating doctors. Feuerer argued also that the District Judge's ruling that any error he may have made was harmless, was clearly erroneous.

On June 11, 1986, the Third Circuit entered a judgment order affirming the judgment of the District Court. See, Appendix B at 8a-10a. No memorandum or opinion was issued by the Third Circuit.

On June 25, 1986, Feuerer filed a timely petition for a panel rehearing with

the Third Circuit under Fed.R.App.P. 40(a). In that petition, Feuerer once again argued that the District Court had committed reversible and not harmless error in charging the jury on the matter of intervening negligence of her treating doctors. In the petition for a rehearing, Feuerer argued further that, in affirming the District Judge's ruling that he had not committed reversible error in so charging the jury, the Third Circuit had overlooked and misapplied its own well-established precedents.

On July 9, 1986, the Third Circuit panel which had considered Feuerer's appeal, entered an order, without explication, denying the petition for a rehearing. See, Appendix C at 11a. Feuerer is filing this petition within ninety days after the date of entry of the Third Circuit's order denying the petition

for a rehearing. Accordingly, this petition is timely.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Ruling Affirming The District Court's Order Denying Feuerer's Motion For A New Trial Conflicts With Decisions Of This Court, The Third Circuit, Other Circuits And The Highest Courts Of The State Of New Jersey

In affirming the District Judge's ruling on the propriety of the charge dealing with the intervening negligence of Feuerer's treating doctors, the Third Circuit overlooked, misapplied and/or disregarded decisions of the Supreme Court, other Circuits and the highest courts of the State of New Jersey. The Third Circuit's decision is also in direct conflict with the its own well-established precedents.

Under New Jersey law, which was applicable to this case, the charge on intervening negligence was clearly erroneous and should never have been

given. The highest appellate courts of New Jersey have ruled that a tortfeasor such as Adamar is automatically responsible, as a matter of law, for any aggravation of injuries it caused, which result from the negligence of a doctor who treated the Plaintiff for those injuries. As the Court stated in Knutsen v. Brown, et al., 96 N.J. Super. 229, 235 (App.Div.1967),

> Where a person has suffered personal injury by reason of another's negligence, the tortfeasor is liable for any additional harm caused to the injured person by the negligence, mistake or lack of skill of the attending physician or surgeon.

See also, Ciluffo v. Middlesex General Hospital, 146 N.J. Super. 476, 482 (App.Div.1977); Knutsen v. Brown, et al., 93 N.J. Super. 522, 542 (Law Div. 1966)("Wrongdoers are liable for the reasonably foreseeable consequences of the tortious act, including the malpractice of a doctor").

Accordingly, the District Judge's charge misstated New Jersey law, which holds Adamar automatically liable for any aggravation of the injury it initially caused, which aggravation was caused by the treating doctors' subsequent negligence. The erroneous charge might have caused the jury to award Feuerer a lower amount of damages than it otherwise would have awarded her. To the extent that the District Judge ruled that his charge on intervening negligence was not erroneous, (the District Judge assumed arguendo that he had erred without expressly admitting that he had), his ruling was patently erroneous. The Third Circuit erred in not finding that the District Court had committed reversible error in charging the jury on this matter; its ruling is therefore in direct and irreconciliable conflict with decisions of the highest courts of New Jersey.

The Third Circuit's ruling affirming the District Court is also in direct conflict with decisions of this Court on which the Third Circuit has relied in ordering new trials in other cases. In Ayoub v. Spencer, 550 F.2d 164, 168 & n.7 (3d Cir.) cert. denied, 432 U.S. 907, 97 S.Ct. 2952, 53 L.Ed.2d 1079 (1977), the Third Circuit correctly ruled that where, as in this case, an erroneous charge is given to a jury, a new trial must be allowed if the improper instructions "might have been responsible for the verdict"; an appellant need not show that the error was in fact prejudical. The Court in Ayoub, supra, ruled further that in determining whether erroneous jury instructions require the grant of a new trial, whether the instructions actually did bring about the verdict is not dispositive; if the charge "may have resulted" in the verdict appealed from, a

new trial is mandatory. Id. at 550 F.2d 164, 168 & n.7. Clearly, the improper instruction on intervening negligence might have contributed to, and could have been responsible for the low verdict which the jury returned for Feuerer. See discussion below. Accordingly, the District Judge's error was reversible, not harmless, and the Third Circuit erred in failing to so find.

In ruling as it did in Ayoub, supra, the Third Circuit properly relied on the Supreme Court's decisions in Malat v. Riddell, 383 U.S. 569, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966) and Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962). In failing to find in Feuerer's case that the District Judge committed reversible error in charging the jury on the issue of intervening negligence of her treating doctors, the

Third Circuit inexplicably disregarded these two decisions, as well as its prior ruling in Ayoub, supra. Its ruling in Feuerer's case is in direct conflict with all three of these cases. In Malat v. Riddell, supra, this Court ruled that where a lower court applies an incorrect legal standard, a new trial is mandatory; an appeals court should not consider whether the verdict would be supportable on the facts of the case had the correct one been applied. 383 U.S. at 572, 86 S.Ct. 1030, 16 L.Ed.2d at 105. Similarly, in Sunkist Growers, supra, this Court ruled, at 370 U.S. 30, 82 S.Ct. 1130, 8 L.Ed.2d at 312,

> Since we hold erroneous one theory of liability upon which the general verdict may have rested - a conspiracy among petitioners and Exchange Lemon - it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in Maryland use of Markley v. Baldwin, 112 US 490, 493, 28 L ed 822, 823, 5 S.Ct. 278 (1884), "[I]ts generality prevents us from perceiving upon which

> plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld...." (Emphasis Added)

In this case, since the jury could have been misled by the erroneous charge to believe, and to find that Feuerer was not entitled to recover damages from Adamar for the consequences of some or all of the treatment that was rendered by her two treating doctors, under the teachings of Malat, supra and Sunkist Growers, supra, upon which the Third Circuit correctly relied in deciding Ayoub, supra, the Third Circuit should have granted Feuerer a new trial.

The Third Circuit's affirmance of the District Judge's ruling is also in direct contravention of other compelling Supreme Court authority. In McCandless v. United States, 298 U.S. 342, 347-48, 56 S.Ct. 764, 80 L.Ed. 1205 (1936), this Court ruled,

> [A]n erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. United States v. River Rouge Co., 269 U.S. 411, 421, 70 L. ed. 339, 346, 46 S.Ct. 144; Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 82, 63 L. ed. 853, 856, 39 S.Ct. 435; Williams v. Great Southern Lumber Co., 277 U.S. 19, 26, 72 L. ed. 761, 767, 48 S.Ct. 417.

In Ratay v. Lincoln National Life Insurance Company, 378 F.2d 209, 212 (3d Cir.), cert. denied, 88 S.Ct. 472, 389 U.S. 973, 19 L.Ed.2d 465 (1967), the Third Circuit correctly relied on McCandless, supra, in ordering a new trial. But in this case, the Third Circuit inexplicably disregarded McCandless in affirming the ruling of the District Judge.

Clearly, it does not "affirmatively appear" from the record in this case that the District Judge's error in charging the jury was harmless, and not prejudicial. The District Judge's finding that if it erred in charging the jury on the

intervening negligence of Feuerer's treating doctors, (and it clearly did err, for the reasons stated above), the error was harmless, was patently wrong. The Third Circuit clearly erred and improperly disregarded McCandless in failing to so find.

In concluding that its error was harmless rather than reversible because of the timing of Dr. Greene's first operation, the District Court improperly disregarded the unrebutted evidence which showed that Feuerer's other treating doctor, Dr. Limberakis, had treated Feuerer for her knee injuries suffered in the fall throughout the entire period of the jury's damages award: December 10, 1981 to December 24, 1982. The erroneous charge on intervening negligence was broad enough to include both Dr. Greene and Dr. Limberakis. The District Judge stated: "You can consider whether or not the

treatment by her doctors caused or exacerbated the condition..." (Emphasis Added). Based on the erroneous charge, therefore, the jury might have reduced (to $50,000.00) the damages award it otherwise would have made but for its determination that Dr. Limberakis was negligent in treating Feuerer from December 10, 1981 to December 24, 1982. Accordingly, the fact that Dr. Greene did not operate on Feuerer until September of 1983, in no way leads to the conclusion that the District Judge's error in charging the jury was harmless. Moreover, the jury may also have decided not to award Feuerer damages for the operations performed by Dr. Greene, or for the results of those operations, based on the erroneous charge; the District Judge improperly speculated on what the jury actually found.

Under the teachings of McCandless, supra, then, the District Judge

erroneously and improperly concluded that its error was harmless and not reversible. Such a finding is not supported nor supportable by the record. The Third Circuit erred and overlooked clear Supreme Court precedent in affirming that ruling.

In affirming the District Judge's ruling, the Third Circuit is also in clear and direct conflict with the decisions of the other Circuits. As noted above, there was not a shred of competent evidence presented at the trial by either party that Feuerer's treating doctors were negligent or guilty of malpractice in treating her. The District Judge acknowleged as much when he stated in his opinion that he would assume that he erred in charging the jury on the intervening negligence of the doctors.

The other Circuits have ruled that it is fundamental, reversible error for a judge to charge a jury on a matter on

which no evidence or competent proof is presented. See, e.g., Nestier Corp. v. Menasha Corporation - Lewisystems Div., 739 F.2d 1576 (Fed.Cir.1984); Ware v. Reed, 709 F.2d 345 (5th Cir. 1983); Kirschner v. Broadhead, 671 F.2d 1034 (7th Cir. 1982)(It is prejudicial error for a trial court to give instructions which find no support in the evidence unless the record shows that the error is clearly harmless); Ybarra v. Burlington Northern, Inc., 689 F.2d 147 (8th Cir. 1982); Bechtel v. Liberty National Bank, 534 F.2d 1335 (9th Cir. 1976); Brownlow v. Aman, 740 F.2d 1476 (10th Cir. 1984); Collins v. Metropolitan Life Ins. Co., Inc., 729 F.2d 1402 (11th Cir. 1984).

In Paluch v. Erie Lackawanna Railroad Company, 387 F.2d 996, 999, 1000 (3d Cir. 1968), the Third Circuit itself ruled that it is reversible error for a judge to charge a jury on a matter on which no

evidence is presented. But inexplicably, the Third Circuit disregarded Paluch, supra, and the rulings of the other Circuits, in affirming the District Judge in this case. As the Court noted in Paluch, at 387 F.2d 1000,

> The charge to the jury in this case on an issue on which no evidence had been offered was such fundamental error. Allowing the jury to speculate on contributory negligence and thereby possibly to diminish the compensation recoverable, under the circumstances of this case, was a miscarriage of justice.
>
> This fundamental error compels a new trial.

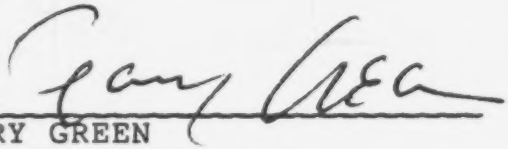
In this case, based on the District Judge's erroneous charge, and the complete lack of any competent evidence of malpractice, the jury was allowed to "speculate" on the issue of malpractice, and it may have awarded Feuerer less than it otherwise would have awarded her but for its determination that one or both of the doctors were negligent. This is more

than enough to require a new trial. Accordingly, the District Judge's error was not harmless, but reversible, and the Third Circuit's ruling affirming the District Judge on that issue is in direct conflict with Paluch, supra, and with the decisions of the other Circuits.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment of the Third Circuit, and the order of the Third Circuit denying the petition for a rehearing.

Respectfully submitted,



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ROBERT A. DAVITCH
On the Petition

DATED: October 7, 1986

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINDA A. FEUERER	:	CIVIL ACTION
	:	
v.	:	
	:	
ADAMAR OF NEW JERSEY, INC.	:	NO. 83-5931

M E M O R A N D U M

McGLYNN, J. SEPTEMBER 17, 1985

Before the court is a motion for a new trial by plaintiff who was injured when she slipped and fell in a public restroom at the Tropicana Hotel and Casino in Atlantic City, New Jersey. At trial, the jury assessed damages in the amount of $50,000 and found that defendant was 75% negligent and the plaintiff 25%.

In a ninety page opening brief and a 26 page reply brief, plaintiff has collected an array of arguments based upon "unrefuted", "unrebutted" and "overwhelming" evidence in support of the proposition that the jury's award was inadequate, arbitrary and contrary to the

law and the evidence. Consequently, she would like an opportunity to convince another jury to take a more generous view of her claims.

The nature and the extent of the injuries suffered by plaintiff as a result of the fall was the primary issue in the case.

Plaintiff contended that as a result of the fall, she developed a painful, progressive and permanent condition in both knees known as "Chondromalacia" which is characterzed by a degeneration of the cartilage under the kneecaps. The defendant, on the other hand, argued that plaintiff's fall resulted in only minor injuries, that the chondromalacia was congenital or that it was triggered or exacerbated by trauma to her knee suffered in two subsequent automobile accidents.

No citation is necessary for the basic principle of law that plaintiff has

the burden of proof as to damages as well as liability, and as the court instructed the jury, they "are not to award damages for any injury or condition from which the plaintiff may have suffered unless it can be established by a preponderance of the evidence in the case that such injury or condition was proximately caused by the accident in question." (Tr. 11/16/84 at 100).

Given the state of the record in this case which, at the very least, raised serious questions concerning the credibility of the plaintiff, her experts and her treating physicians, I cannot find any basis for overturning or ignoring the verdict of the jury.

As the Supreme Court stated in Tennant v. Peoria & P. & U. Railway Company, 321 U.S. 29 (1944):

> The focal point of judicial review is the reasonableness of a particular inference or conclusions drawn by the jury. It is the jury, not the court,

> which is the fact finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (citations omitted) That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. 321 U.S. at 35.

Plaintiff also challenges the jury's determination that she was 25% negligent. On the basis of the evidence, the jury could have found that she was walking quickly and not looking where she was going in a dimly lit area where it is foreseeable that water would be in her path. This is sufficient to find a lack of care on her part.

Finally, plaintiff argues that the court's instruction to the jury that the defendant would not be responsible for the

intervening negligence of the treating physician was error. In context, that portion of the charge properly informed the jury that it had the right to determine the cause of plaintiff's injuries. There was evidence from which the jury could infer that her injuries from the fall had been cured as of July 1982. There was also evidence from which the jury could conclude that the chondromalacia was due to a congenital malalignment of her knees for which she was operated on. Thus, these instructions were simply an extension of prior instructions that the defendant should not be held liable for any injuries unless they proximately resulted from the fall in question.

Moreover, as demonstrated by the jury's note to the court, they were not concerned with events after December 1982

APPENDIX A

- at least nine months before the operation. Thus, even assuming it was error to charge on intervening negligence, such error was harmless.

Plaintiff's motion for a new trial will be denied.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LINDA A. FEUERER	:	CIVIL ACTION
	:	
v.	:	
	:	
ADAMAR OF NEW JERSEY, INC.	:	NO. 83-5931

O R D E R

AND NOW, this 17th day of SEPTEMBER, 1985, upon consideration of plaintiff's motion for a new trial and the defendant's response thereto, it is hereby

ORDERED that the motion be and the same is hereby DENIED.

BY THE COURT:

Joseph L. McGlynn, J. /s/
JOSEPH L. MC GLYNN, JR., J.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

NO. 85-1600

LINDA FEUERER,

Appellant

v.

ADAMAR OF NEW JERSEY, INC.

On Appeal from the United States
District Court for the Eastern District
of Pennsylvania
Civil No. 83-5931
(Honorable Joseph L. McGlynn, Jr.)

Submitted Under Third Circuit Rule
12(b)
June 4, 1986

Before: ADAMS, WEISS, and HIGGINBOTHAM,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

APPENDIX B

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

Arlin M. Adams /s/
Circuit Judge

ATTEST:

Sally Mrvos /s/
Sally Mrvos, Clerk

DATED: June 11, 1986

APPENDIX B

85-1600

July 18, 1986

Certified as a true copy
and issued in lieu of a
formal mandate on July 18,
1986

Test: M. Elizabeth Ferguson

Chief Deputy Clerk, United
States Court of Appeals for
the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

NO. 85-1600

LINDA FEUERER,

Appellant

v.

ADAMAR OF NEW JERSEY, INC.
(Civil No. 83-5931)

SUR PETITION FOR PANEL REHEARING

Present: ADAMS, WEIS, and HIGGINBOTHAM, Circuit Judges

The petition for panel rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

BY THE COURT:

Arlin M. Adams /s/
Circuit Judge

DATED: Jul 9 1986

Supreme Court, U.S.
FILED
NOV 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-579

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LINDA FEUERER,
Petitioner

vs.

ADAMAR OF NEW JERSEY, INC.,
Respondent

BRIEF OF RESPONDENT ADAMAR OF NEW JERSEY, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MARK ALAN CORCHIN
MESIROV, GELMAN, JAFFE
CRAMER & JAMIESON
1500 FIDELITY BUILDING
PHILADELPHIA, PA. 19109
(215) 893-5000
ATTORNEYS FOR RESPONDENT

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COUNTERSTATEMENT OF THE CASE

This Brief is submitted by ADAMAR OF NEW JERSEY, INC. ("Adamar"), the Defendant in this personal injury action, in opposition to the Petition by the Plaintiff, LINDA FEUERER ("Feuerer"), for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review the Judgment Order denying Plaintiff's Petition for a panel rehearing with the Third Circuit, and affirming the final Order of the United States District Court for the Eastern District of Pennsylvania denying Plaintiff's Motion for a New Trial.

This case involves a personal injury action brought in the United States District Court for the Eastern District of Pennsylvania because of diversity of

citizenship, in which Feuerer sought damages from Adamar resulting from a fall in a public restroom on December 9, 1981.

A jury trial resulted in a verdict in favor of Feuerer in the amount of Fifty Thousand Dollars ($50,000.00). The verdict was molded to Thirty-seven Thousand Five Hundred Dollars ($37,500.00) because of the jury's determination that Feuerer was twenty-five percent (25%) responsible for the damages she sustained on December 9, 1981. The judgment was subsequently molded to account for pre-judgment interest.

Feuerer filed a Motion for a New Trial contending, inter alia, that the verdict was against the weight of the evidence; that the verdict was inadequate as a matter of law;

and that the lower court had erred in its charge to the jury.

On September 17, 1985, the District Court, citing Feuerer's desire for an "opportunity to convince another jury to take a more generous view of her claims," and the "serious questions concerning the credibility of the Plaintiff, her experts and her treating physicians," denied the Motion. The District Court further stated that the jury charge, which is the basis of the present Petition for Writ of Certiorari, when read "In context, that portion of the charge properly informed the jury that it had the right to determine the cause of plaintiff's injuries."

On September 30, 1985, Feuerer appealed to the Third Circuit from the District

Judge's Memorandum and Order denying her Motion for a New Trial. On June 11, 1986, the Third Circuit entered a Judgment Order, without memorandum or opinion, affirming the judgment of the District Court.

On June 25,1986, Feuerer filed a Petition for a Panel Rehearing with the Third Circuit. On July 9, 1986, the Third Circuit entered an Order, without opinion, denying the Petition for Rehearing.

Feuerer filed this Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit on October 7, 1986.

REASONS FOR NOT GRANTING THE WRIT

I. ABSENT A CONFLICT BETWEEN THE THIRD CIRCUIT'S RULING AFFIRMING THE DISTRICT COURT'S ORDER DENYING FEUERER'S MOTION FOR A NEW TRIAL AND THE DECISIONS OF THIS COURT, THE THIRD CIRCUIT, OTHER CIRCUITS AND THE HIGHEST COURT OF THE STATE OF NEW JERSEY, NO REASON EXISTS FOR THE GRANT OF CERTIORARI.

The Third Circuit did not overlook, misapply and/or disregard the decisions of the Supreme Court, other Circuit Courts and the highest Court of the State of New Jersey in affirming the District Judge's ruling on the propriety of the charge dealing with intervening negligence. The Third Circuit's decision is also not in direct conflict with its own well-established precedents.

The District Judge did not commit reversible error in instructing the jury on the issue of intervening negligence. Petitioners take a portion of the jury charge

completely out of context and argue that it was a misstatement of the law. As the District Judge stated in his Memorandum and Opinion of September 17, 1985,

> In context, that portion of the charge properly informed the jury that it had the right to determine the cause of Plaintiff's injuries. There was evidence from which the jury could infer that her injuries from the fall had been cured as of July, 1982. There was also evidence from which the jury could conclude that the chondromalacia was due to a congential malalignment of her knees for which she was operated on. Thus, these instructions were simply an extension of prior instructions that the Defendant should not be held liable for any injuries unless they proximately resulted from the fall in question.

The District Judge's charge was proper and not erroneous; therefore, the cases which Petitioner cites in her Petition, which state that where a lower court applies an incorrect legal standard, a new trial is mandatory, simply do not apply. It follows that the

claimed conflict does not and cannot exist. The Third Circuit did not disagree with the decisions of the United States Supreme Court, other circuit courts, the Third Circuit itself, and the New Jersey Supreme Court decisions which Petitioner cites, as these decisions are totally inapplicable.

II. THE ALLEGED PRESENT CONTROVERSY IS NOT OF SUFFICIENT MAGNITUDE AND IMPORTANCE TO WARRANT CONSIDERATION BY THE HIGHEST COURT IN THE UNITED STATES.

The United States District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals have fully considered and correctly decided the issues presented by this case. In fact, the Third Circuit affirmed the District Court's decision without opinion. The present case is a standard personal injury action, which is in Federal Court because of a diversity of

citizenship. There exist no conflict, no Federal question and no issue of sufficient magnitude and importance to warrant the attention of this Court.

The decision below turns on its own facts and will affect few others than the litigants. As a unanimous Supreme Court stated in Layne and Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S.Ct. 422, 423, 67 L.Ed. 712 (1923):

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

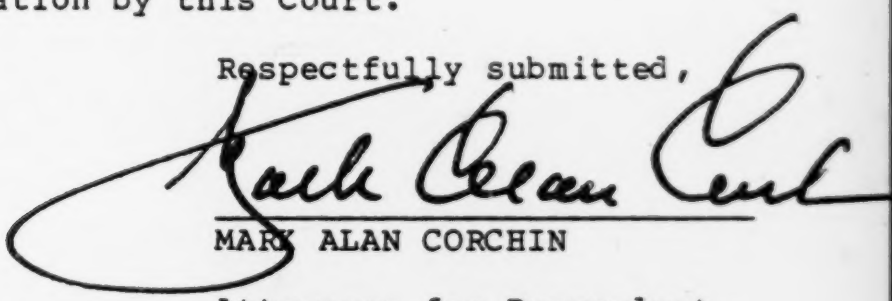
Given the workload of the Supreme Court and the lack of importance of the issues

which Petitioner presents, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondent respectfully submits that Petitioner failed to establish any reason justifying the issuance of a Writ of Certiorari to the United States Court of Appeals for the Third Circuit. Specifically, Petitioner has failed to show that the Third Circuit is in conflict with this Court, other Circuit Courts, itself, or the New Jersey Supreme Court, or that the issues which Petitioner presents are of sufficient magnitude and importance to warrant consideration by this Court.

Respectfully submitted,



MARK ALAN CORCHIN

Attorneys for Respondent,
Adamar of New Jersey, Inc.

RULE 28.1 STATEMENT

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondent makes the following statement disclosing parents, non-wholly owned subsidiaries and affiliates:

ADAMAR OF NEW JERSEY, INC.:

Ramada, Inc. (Parent corporation)